IN THE

Supreme Court of the United States

October Term, 1964

No. 22

ALL STATES FREIGHT, INC., ET AL.,
Appellants,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY (RICHARD JOYCE SMITH, WILLIAM J. KIRK, and HARRY W. DORIGAN, Trustees), ET AL.

On Appeal From the United States District Court for the District of Connecticut.

MOTION TO AFFIRM.

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CASES CITED.

STATUTES AND RULES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 719.

ALL STATES FREIGHT, INC., ET AL.,
Appellants

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY (RICHARD JOYCE SMITH, WILLIAM J. KIRK, AND HARRY W. DORIGAN, TRUSTEES), ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

MOTION TO AFFIRM.

Appellees, pursuant to Rule 16 of the Revised Rules of this Court, move that the final judgment of the District Court be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT.

This is a direct appeal from the final judgment entered on September 16, 1963, by a District Court of three judges specially constituted pursuant to 28 U. S. C. §§ 2284 and 2325. In that judgment, the court below, in accordance with its opinion in *The New York, N. H. & H. R. R. Trustees v. United States*, 221 F. Supp. 370 (D. C. Conn. 1963) [1] set aside a report and order of the Interstate Commerce Commission and enjoined the enforcement thereof.

The opinion of the District Court sets forth the nature of the freight rates involved in the investigation before the Commission and notes that the rates have been in full force and effect since July 16, 1959, after reversal by the Commission of its initial order to suspend the schedules, under Section 17(8) of the Interstate Commerce Act, pending investigation.[2]

As the Court noted, the New York, New Haven and Hartford Railroad Company, initiated the rates in issue because it was faced with the loss of traffic to highway carriage and the newly established trailer-on-flatcar service of other railroads (which latter service the New Haven was not in a position to handle extensively because of equipment and clearance difficulties) and because it was plagued with a large number of empty boxcars moving west, primarily because of intense competition from unregulated carriers.

In the face of declining revenues, and recognizing the need to cope with drastic changes on the part of its rail and truck competitors with regard to both technology and pricing, the New Haven took the only feasible course open to it, i.e., to revise its pricing as to articles of freight most susceptible to diversion from it to other transporta-

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1. Printed in full in Appellants' Jurisdictional Statement as Appendix A. All page references in this motion are to the Jurisdictional Statement.

2. 49 U. S. C. § 17(8).

tion services, such as the trailer-on-flatcar service of competing railroads, which it had no funds to provide on a fully competitive scale.

Thus, it initiated pricing for specified service in boxcars which would achieve the objective not only of inducing shippers to use the New Haven's service, but to encourage particularly those served by rail sidings to use boxcar service having excess capacity (because of the empty return movement westbound), thus increasing revenues at negligible additional cost. The incentive rates, which diminish on the 100-pound basis with the increase in total weight shipped in one car, are those involved in this appeal (17a). Similar rate schedules were filed by competing railroads serving New England and connecting carriers gave their concurrences.

These rates were initially suspended by the Commission and made the subject of an investigation at the request of Eastern Central, an Appellant herein, and another motor carrier association which took no further part in the proceedings. As stated previously, the suspension order was vacated upon the petition of Appellees and certain supporting shippers. No shipper opposed the rates; only the New Haven's truck competitors.

The rates not only cover out-of-pocket costs but, as found by Division 2 in the original report, they "more than cover fully-distributed costs" (*All Commodities from New England to Chicago and St. Louis*, 313 I. C. C. 275, 280). This means that the rates not only cover the direct cost of performing the service to which they apply, but also cover overhead costs allocable thereto, including an element for return on investment and a contribution to the passenger deficit and less-than-carload deficit of the New Haven. The report of the entire Commission took no issue with this finding and, in substance, affirmed it (19a). Thus the Commission found no difficulty from the standpoint of the rates being compensatory. And it likewise did not question that the purpose of the rates was to regain traffic and

halt diversion of traffic to rail-truck (trailer-on-flatcar), motor common carrier and private transportation and to utilize cars which would otherwise return empty westbound, the only direction in which the rates applied. There was no criticism of the application of the rates respecting description of freight, equipment used, or direction of traffic flow. There was no finding that motor carriers were the low-cost carriers, nor could there have been such a finding since there was no evidence of the cost of transportation by motor carrier.

The majority did find that the rates constitute a destructive competitive practice in contravention of the National Transportation Policy,[3] and that they violate the provision of Section 1(6),[4] which requires reasonable classifications of property.

The court below found that Section 1(6) of the Act was intended to give the Commission power to protect shippers by controlling the maximum charges for transportation of their freight, that the Commission has so interpreted it for many years (9a), and that it has no application in this case (10a). It found further that there is no evidence to support a finding of destructive competition (13a).

Thus, the Court said that the Commission, having no evidentiary basis to condemn the rates under sections of the Act governing competitive rate reductions, could not do so under a section intended to govern maximum reasonable rates for the protection of shippers.

Although the motor carrier association and certain of its members, intervenors below, filed a notice of appeal herein on or about November 2, 1963, neither the United States nor the Interstate Commerce Commission did so.

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3. 49 U. S. C. preceding §§ 1, 301, 901, 1001.

4. 49 U. S. C. § 1(6). "It is hereby made the duty of all common carriers subject to . . . this part to establish, observe and enforce just and reasonable classifications of property for transportation, with reference to which rates . . . may be made . . ."

Instead, the latter filed a joint memorandum advising the Court that the Commission believes the District Court's decision to be based upon an erroneous interpretation of Section 1(6) and of the National Transportation Policy. But it nevertheless refused to appeal because it entertains doubt as to adequacy of its findings in relation to matters relied on by the District Court. In this state of self-doubt, the Commission voted to reopen the proceedings.

It thus appears that the Commission now wishes to have nullified the decision of the District Court by imputing its own inadequate findings to the Court. Reopening the case before the Commission will have no effect on the unlawful application of Section 1(6) by the Commission. The motor carrier Appellants who presented the sole evidence before the Commission in opposition to the rates are apparently satisfied with the state of the record before the Commission.

In any event, it seems entirely clear that the action of the Commission does not eliminate the controversy as between the parties here. The memorandum of the Commission implies that it intends to follow the reopened hearing with a new report containing the same conclusion respecting Section 1(6). Thus, the issues herein are not moot under *Southern P. Terminal Co. v. Interstate Commerce Com.*, 219 U. S. 498, 55 L. ed. 310, 31 S. Ct. 272 (1911).

ARGUMENT IN SUPPORT OF THE MOTION.

That the questions presented are not substantial, may readily be demonstrated by analysis of the Appellants' argument in support of the proposition that they are substantial. (This analysis will also show that the statement of the questions presented on pages 5 and 6 of the Jurisdictional Statement are not correct statements.)

The first reason assigned by Appellants in support of their argument that the questions are substantial is that the District Court's decision lays down "a new interpretation of the Interstate Commerce Act, said by the Court to be made necessary by reason of changed economic circumstances and past legislative modification through administrative decisions" (9). This is not correct. As the District Court's opinion shows (9a), the just and reasonable classification requirement of § 1(6) was adopted in 1910 to give the Commission control over classification (the classification of property used in connection with class rates), and "its purpose was to protect shippers by controlling the maximum charges for transportation of commodities." The Court also said "The practice of the Commission over the past 21 years, as pointed out by Commissioner Webb in his dissent in the instant case, was consistent with this interpretation." After citing certain cases, the Court said "We can see no difference in principle between those cases and the one before us and no sound reason for so interpreting § 1(6) as to prohibit such competitively compelled departures from classifications, within the established maxima, absent some other violation of the Act than the mere departure from the classification" (9a-10a).

Having thus established what the consistent interpretation of the classification requirement of § 1(6) was over the years, the Court referred to the Commission's present fears that approval of the rates in question "would be legislation on its part". Then the Court observed that since

the vast preponderance of traffic already moves at rates below the class rates, it would seem that the Commission has already effectively "legislated or interpreted" the modification of "*what it now claims* was the original meaning and purpose of § 1(6)". (Italics supplied.) It was with reference to what the Commission "now claims" to be the original meaning and purpose of § 1(6) that the Court addressed these remarks and the next sentence that it is strange to find it boggling at the final step of so little effect on traffic moving under class rates. This latter is purely a factual situation. The Court is saying, in effect, that since practically all traffic now moves on commodity rates, it is strange to find the Commission, which permitted this, suddenly to urge that approval of rates such as those involved would be a blow to classification. Then the Court said (10a and 11a), that

> "In any case, we do not agree that these rates are or ever were a violation of the language or intent of section 1(6). Commodity rates are sufficiently policed under sections 1(5); 2; 3(1); and 15a(3). The record discloses no violation of these sections."

Instead, therefore, of laying down "a new interpretation of the Interstate Commerce Act", as charged by Appellants, the Court simply held to the consistent interpretation given § 1(6) over the years.

The foregoing discussion is sufficient also to show that the Appellants are incorrect in the second reason assigned by them for a conclusion that the questions are substantial, namely, that the decision below holds that the meaning of the Interstate Commerce Act should be modified to meet the economic circumstances existing at the time of decision. It is plain that the Court adhered to the interpretation consistently given to the classification provision of § 1(6) since its enactment.

The third reason given by Appellants in their argument that the questions are substantial is that the lower

Court ignored a "finding" by the entire Commission that during a certain period the New Haven transported more than 4 million pounds of additional traffic at the rates involved in return for only $129.00 of additional gross revenue. Then Appellants state that "In the face of that factual finding, the Court below overturned the Commission's conclusion that the rates constitute a destructive competitive practice" (p. 9). This is hardly the sort of matter that merits the attention of this Court. Moreover, the statement cited does not appear to have been given any weight by the Commission. It is not even mentioned in that part of the report in which the Commission purports to state the reasons for its conclusions, the part entitled "Discussion and conclusions" (20a). It is not difficult to see why the Commission did not attach to this statement the significance which the Appellants would have the Court attach to it. The object of the New Haven in publishing the rates was not only to attract additional traffic—welcome though that would be—but also to retain what they had against the mounting pressures of competition. The Commission found that "Within 2 months after the establishment of the plan III [trailer-on-flatcar] service on July 21, 1958, the New Haven lost the equivalent of over 400 boxcar loads of this traffic to the New York Central" (17a). It may be noted also that in discussing the figures cited by Appellants and other like figures, the Commission stated what the revenue effect would have been on traffic formerly moved by the New Haven at the old rates, "had it continued to" move by the New Haven at such rates (18a). Along the same lines, Commissioner Webb pointed out, in his dissenting opinion (26a):

> ". . . the majority does not find that the proposed rates would harm the New Haven's competitors without benefiting the carrier, probably because there is no indication that the traffic actually moved under the proposed rates would have moved under the rates which would be superseded."

Not only was there no way of determining the volume of traffic which would have moved in the absence of the new rates, but there was also no indication of what the average weight of the lading per car would have been. Thus, the relative cost of transportation under the prior rates is unknown and the relative benefits in the form of net revenues accruing to the carrier is likewise unknown.

That there was nothing in the Court's treatment of the Commission's finding based upon the "destructive competitive practice" theory which warrants the attention of this Court is clear from the lower court's conclusion with respect to this point (12a to 13a):

> "The finding that the rates will be destructive of competition rests on a basis not entirely clear to us. It would appear rather that they would enable the railroads 'to respond to competition by asserting whatever inherent advantages of cost and service they possessed.' The rates are admittedly compensatory, exceeding the out-of-pocket costs and in most instances making a substantial contribution to overhead. There is no finding based on evidence that the rates would destroy or impair the inherent advantages of other modes of transportation. The finding of destructive competition is not adequately supported on the present record."

This is quite an ordinary conclusion which presents no substantial question for this Court. Moreover, it is in harmony with this Court's decision in *I. C. C. v. New York, New Haven & Hartford R. Co.*, 372 U. S. 744 (1963) and with the following decisions of three-judge District Courts: *Missouri Pacific R. R. Co. v. U. S.*, 203 Fed. Sup. 269 (1962) (E. D., Mo.); *Pennsylvania R. R. Co. v. U. S.*, 202 Fed. Sup. 584 (1962) (E. D., Pa.); *St. Louis-San Francisco R. R. Co. v. U. S.*, 207 Fed. Sup. 293 (1962) (E. D., Mo.).

Appellants' contention that the Court's references to the value of service principle are contrary to the necessary

implications of this Court's decision in *Baltimore & Ohio Railroad Co. v. U. S.*, 345 U. S. 146 (1953) is also without merit. The District Court referred to this matter (11a) simply as appearing to afford an explanation for the Commission's having invoked § 1(6), which the Court had previously found (10a) not to have been violated. In its statements concerning the value of service principle and the National Transportation Policy (which latter, it said, was "intended to permit the railroads, no longer effective monopolies, to respond to competition by asserting whatever inherent advantages of cost and service they possessed") the Court was simply pointing out the obvious fact that rates cannot be held at levels based upon notions of value of service (high value of commodity = high rate) in a non-monopolistic transportation environment wherein competitors, both regulated and unregulated, elect to assess rates on a much lower level. This does not prevent a carrier from charging higher rates, when it can successfully do so, in order to offset lower rates on such articles as the fruits and vegetables involved in *Baltimore & Ohio Railroad Co. v. U. S., supra,* which was, moreover, a case involving maximum reasonableness and not minimum rates as here involved.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the decision below is correct and that this appeal presents no substantial questions. The judgment of the District Court should be affirmed.

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Due: February 26, 1964.

PROOF OF SERVICE.

I, Edward A. Kaier, Attorney for the Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25th day of February, 1964, I served copies of the foregoing motion on the several parties by mailing copies thereof, properly addressed, and with postage prepaid to:

1. Honorable Robert Kennedy, Attorney General of the United States, Department of Justice, Washington 25, D. C.
2. Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.
3. John H. D. Wigger, Esquire, Attorney, Department of Justice, Washington 25, D. C.
4. Robert C. Zampano, United States Attorney for the District of Connecticut, Federal Building, New Haven, Conn.
5. Robert W. Ginnane, Esquire, General Counsel Interstate Commerce Commission Washington 25, D. C.
6. Fritz R. Kahn, Esq., Asst. General Counsel Interstate Commerce Commission Washington 25, D. C.
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